



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

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Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Elkhorn Slough Tidal Marsh Restoration Project, Phase III in Monterey County, California

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of incidental harassment authorization.

SUMMARY: NMFS has received a request from the California Department of Fish and Wildlife (CDFW) for the re-issuance of a previously issued incidental harassment authorization (IHA) with the only change being effective dates. The initial IHA authorized take of Pacific harbor seals (*Phoca vitulina*), by Level B harassment only, incidental to the Elkhorn Slough Restoration Project, Phase III, at the Seal Bend Restoration Area in Monterey County, CA. The project has been delayed and none of the work covered in the initial IHA has been conducted. The initial IHA was effective from September 16, 2021, through September 15, 2022. CDFW has requested re-issuance with new effective dates of September 16, 2022, through September 15, 2023. The scope of the activities and anticipated effects remain the same, authorized take numbers are not changed, and the required mitigation, monitoring, and reporting remains the same as included in the initial IHA. NMFS is, therefore, issuing a second identical IHA to cover the incidental take analyzed and authorized in the initial IHA.

DATES: This authorization is effective from September 16, 2022, through September 15, 2023.

ADDRESSES: An electronic copy of the final 2021 IHA previously issued to CDFW, CDFW's application, and the ***Federal Register*** notices proposing and issuing the initial IHA may be obtained by visiting <https://www.fisheries.noaa.gov/action/incidental-take-authorization-tidal-marsh-restoration-project-elkhorn-slough-phase-iii-2021>. In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Amy Fowler, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

NMFS has defined "negligible impact" in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term “take” means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Summary of Request

On September 22, 2021, NMFS published final notice of our issuance of an IHA authorizing take of marine mammals incidental to the Elkhorn Slough Tidal Marsh Restoration Project, Phase III (86 FR 52644). The effective dates of that IHA were September 16, 2021, through September 15, 2022. On July 12, 2022, CDFW informed NMFS that the project was delayed. None of the work identified in the initial IHA (*i.e.*, restoration work at the Seal Bend Restoration Area) has occurred. CDFW submitted a request that we reissue an identical IHA that would be effective from September 16, 2022, through September 15, 2023, in order to conduct the construction work that was analyzed and authorized through the previously issued IHA. Therefore, re-issuance of the IHA is appropriate.

Summary of Specified Activity and Anticipated Impacts

The planned activities (including mitigation, monitoring, and reporting), authorized incidental take, and anticipated impacts on the affected stocks are the same as those analyzed and authorized through the previously issued IHA.

Phase III of the Elkhorn Slough Tidal Marsh Restoration Project will restore 28.6 acres (11.57 hectares) at the Seal Bend Restoration Area by relocating soil from an upland area called “the borrow” through use of heavy earth moving equipment, within a

12 month period. A detailed description of the planned restoration activities is found in the ***Federal Register*** notice for the proposed initial IHA (86 FR 43204, August 6, 2021). The location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the initial IHA. The mitigation and monitoring are also as prescribed in the initial IHA.

Construction activities are expected to produce airborne noise and visual disturbance that have the potential to result in behavioral harassment of Pacific harbor seals. A description of the methods and inputs used to estimate take anticipated to occur and, ultimately, the take that was authorized is found in the previous documents referenced above. The data inputs and methods of estimating take are identical to those used in the initial IHA. NMFS has reviewed recent Stock Assessment Reports, information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts or take estimate under the initial IHA.

We refer to the documents related to the previously issued IHA, which include the ***Federal Register*** notice of the issuance of the initial 2021 IHA for Phase III of the Elkhorn Slough Tidal Marsh Restoration Project (86 FR 52644, September 22, 2021), CDFW's application, the ***Federal Register*** notice of the proposed IHA (86 FR 43204, August 6, 2021), and all associated references and documents.

Determinations

CDFW will conduct activities as analyzed in the initial 2021 IHA. As described above, the number of authorized takes of the same species and stocks of marine mammals are identical to the numbers that were found to meet the negligible impact and small numbers standards and authorized under the initial IHA and no new information has emerged that would change those findings. The reissued 2022 IHA includes identical

required mitigation, monitoring, and reporting measures as the initial IHA, and there is no new information suggesting that our analysis or findings should change.

Based on the information contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; and (4) CDFW's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action with respect to environmental consequences on the human environment.

Accordingly, NMFS has determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review. This action is consistent with categories of activities identified in CE B4 of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or

threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

However, no incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Authorization

NMFS has issued an IHA to CDFW for restoration activities at the Seal Bend Restoration Area in Elkhorn Slough (Monterey County, CA) from September 16, 2022, through September 15, 2023. All previously described mitigation, monitoring, and reporting requirements from the initial 2021 IHA are incorporated.

Dated: September 9, 2022.

Kimberly Damon-Randall,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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